

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	Case No. 22-CV-05209-GJP
Plaintiff,	:	
	:	
vs.	:	Philadelphia, Pennsylvania
	:	January 22, 2024
AMERISOURCEBERGEN CORPORATION,	:	1:05 p.m.
AMERISOURCEBERGEN DRUG	:	
CORPORATION, INTEGRATED	:	
COMMERCIALIZATION SOLUTIONS, LLC,	:	
	:	
Defendants.	:	
	:	
. . . . .	:	

TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE GERALD J. PAPPERT  
UNITED STATES DISTRICT JUDGE

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1 JANUARY 22, 2024

1:01 P.M.

2 THE COURT: All right. So I have all of the names. I  
3 won't do a roll call, but I know who you are.

4 I've read everything you submitted. Thanks. I  
5 appreciate it. You've done, obviously, a lot of work and given a  
6 lot of thought to your proposed discovery plan and notably within  
7 that, right, your proposed timeline for everything. And I  
8 understand this isn't a 90-day discovery schedule case, and I'm  
9 going to assume that, you know, you gave a lot of thought and  
10 discussion to the schedule. But I do have to ask, is everybody  
11 really sure that it has to be this long?

12 We're talking about trying the case -- first of all,  
13 you give a trial date, I think, did I see July 19 of 2027? Who  
14 in this room is going to tell the jurors that they're going to be  
15 here for eight weeks throughout July and August? Who wants to --  
16 who's volunteering for that duty? Because I'm not doing it. So  
17 let's take that one off the table.

18 But, no, in all seriousness, we're talking about, you  
19 know, three years for fact discovery. Two years, excuse me, for  
20 fact discovery, and then two-and-a-half for all discovery, and  
21 then three-and-a-half for trial.

22 Realizing I'm going to give this group a little more  
23 deference than the usual lawyer or two in the standard case, who  
24 wants to talk about what thought you put into the timeline?

25 MR. JONES: Your Honor, I'm happy to begin.

1 THE COURT: All right.

2 MR. JONES: So I'm Landon Jones for the United States.

3 THE COURT: Okay.

4 MR. JONES: We put a good deal of thought into this. I  
5 mean, this case is a big case, right. We're talking about 70  
6 fact depositions from the parties, not to mention the third party  
7 discovery depositions. That is, you know, a lot in and of  
8 itself. And the document load here is really big.

9 THE COURT: Yeah.

10 MR. JONES: Now, we've already done a good amount of  
11 discovery --

12 THE COURT: Yeah, thank you for that. I saw, yeah.

13 MR. JONES: -- in the course.

14 THE COURT: Yeah.

15 MR. JONES: Even before the complaint was filed of  
16 Amerisource's files as well as some third party discovery. But  
17 we recognize that there's going to be some reciprocal discovery  
18 of the Government in this case, and that --

19 THE COURT: The nerve of them.

20 MR. JONES: Yeah. Right. And so that's going to be a  
21 complicated and, you know, probably a slow process. You know,  
22 slower than we all might like, but it's just the reality of the  
23 situation.

24 THE COURT: Why? Because you're the Government?

25 MR. JONES: No. Well, I mean, partly because there's

1 going to be some specific Government interests at stake in these  
2 documents. Like, if -- we know that Amerisource would like to  
3 seek investigative files from DEA, for example, and those are  
4 going to contain lots of privileged types of documents, like, you  
5 know, grand jury information and things like that. And that's a  
6 big load to process -- deliberative process-type documents.

7           And so that's going to be a laborious process that  
8 we're going to have to work our way through. And, you know,  
9 we've already started on that and, you know, certainly we're  
10 doing our best to process that stuff as best we can, but it's  
11 going to be a lot.

12           And, you know, there's a lot. You know, their initial  
13 discovery requests are, I think, over 100 requests for production  
14 of documents, and we're already in the process of working  
15 cooperatively to try to frame those in a way that we can agree  
16 and we can meet and confer on the scope of those requests. But  
17 even just kind of meeting and conferring on that is going to take  
18 a little bit of work.

19           And then working with the DEA documents coming from us,  
20 the DEA is, you know, diffused. It's spread out. There's  
21 various regional offices all over the country. And so that's a  
22 process of collecting those documents, processing those  
23 documents, and they also may contain competitively sensitive  
24 information, you know, from Amerisource, but also from  
25 potentially Amerisource's competitors, its customers, things like

1 that. And we're working to address that through a protective  
2 order, which we're getting close on. We're not quite there to  
3 submit it to the Court, but I think we're going to finalize that  
4 really, in short order.

5 THE COURT: Okay.

6 MR. JONES: So there's -- then, of course, there's  
7 third party discovery as well, that really is going to go into  
8 the heart of the case, like some of the customers at issue here,  
9 as well as consultants that were working with in Amerisource in  
10 developing supporter monitoring programs.

11 So, I mean, that's kind of a flavor for the types of  
12 issues we're dealing with and why we really wanted to be kind of  
13 proactively seeking a long discovery period, really to minimize,  
14 I think, ultimately the burden on the Court, so that we don't  
15 find ourselves up against the wall.

16 THE COURT: That part of it I like.

17 MR. JONES: Yeah. I thought you might.

18 THE COURT: Well, you get to one of the questions I was  
19 going to ask, which is, is this the time you really feel that you  
20 believe you need, or are you padding it so that you don't have to  
21 come back to me and ask for more time? Because in the latter  
22 situation, what you're saying is, well, we don't really need it,  
23 but just in case. Is it the former and not the latter?

24 MR. JONES: This is truly our good faith, kind of heavy  
25 lift estimate of how we're going to get this done --

1 THE COURT: Okay.

2 MR. JONES: -- without -- you know, hopefully without  
3 coming back to you. Without coming back to you, let's say.

4 THE COURT: Okay. Yeah. Yeah. Okay. I want to  
5 obviously get any thoughts on this that the Defense might have.  
6 But a couple of questions. One. At any point, is it appropriate  
7 for the Court or for the papers to reflect the new name of the  
8 corporation, as in changing the caption or -- I mean, I, in my  
9 opinion, refer to Amerisourcebergen Corporation as such because  
10 that's what all the paper was to that point. But I didn't know  
11 if Amerisourcebergen Corporation have you given that any thought  
12 or whatever you might think is most appropriate.

13 The alleged conduct would have been taken -- would have  
14 taken place at a time when it was Amerisourcebergen Corporation.  
15 What are your thoughts on that? Are you Mr. Nicholas?

16 MR. NICHOLAS: I am.

17 THE COURT: All right.

18 MR. NICHOLAS: I can't believe I'm punting. The very  
19 first question you asked to someone else.

20 THE COURT: Okay.

21 MR. NICHOLAS: Ms. Bohnet is probably -- she's put a  
22 lot of thought into this, so I'm going to let her try to tackle  
23 this seemingly simple question.

24 THE COURT: I didn't think it was that complex, but,  
25 Ms. Bohnet, go ahead.

1 MR. NICHOLAS: To me it is. But go ahead.

2 THE COURT: I hope this isn't a sign of things to come.

3 MS. BOHNET: Oh, it's not. It's not. You know, we  
4 obviously have other litigation going on --

5 THE COURT: Right.

6 MS. BOHNET: -- related to opioids that's been going on  
7 for many years now. In that context, the approach that the  
8 company's taken is to refer to itself as Amerisourcebergen  
9 Corporation, now known as Cencora. Amerisourcebergen Drug  
10 Corporation, the wholesale distributor subsidiary, has not  
11 changed its name.

12 THE COURT: Right.

13 MS. BOHNET: So that makes it a little bit more  
14 complicated. We did do a little bit of research into this, and  
15 it seems to us that it's fine to keep using Amerisourcebergen  
16 Corporation. So that would be our preference, unless anyone --  
17 unless Your Honor has concerns.

18 THE COURT: No, it was clearly, what is your  
19 preference? And if at any point that changes, you'll let me know  
20 and the paperwork can reflect, you know, whatever. Would you  
21 like -- to the extent I refer to your client you want to just  
22 keep it as Amerisourcebergen Corporation, or do you want me to do  
23 the now known as Cencora?

24 MS. BOHNET: I think Amerisourcebergen Corporation is  
25 fine.

1 THE COURT: Fine.

2 MS. BOHNET: Thank you.

3 THE COURT: No problem.

4 MS. BOHNET: Thank you, Your Honor.

5 THE COURT: You could have handled that, Mr. Nicholas?

6 MR. NICHOLAS: I don't know if I could. Maybe.

7 THE COURT: Okay. Good. Second, I have only had one  
8 case, which was a group of cases, class actions, where I needed  
9 to employ a Special Master. I think it's premature for any of us  
10 to think about that now, or unless maybe you'll tell me, no, it's  
11 not. But, you know, you're referencing your efforts to work  
12 things out and things that could be coming, you know, my way. If  
13 this becomes something where we're bogged down in discovery  
14 issues and disputes, let me throw out the fact that this might  
15 be, from my perspective, an appropriate case for the appointment  
16 of the Special Master.

17 I don't know if any of you had any thoughts on that at  
18 this early stage, but that's just something I see coming as a  
19 possibility. Not definite at all. Just how things go, right.  
20 And I wouldn't use -- I'm not smart enough to rely as much as I  
21 should on the offices of the Magistrate Judge, which is Judge  
22 Hey. And I'm just one of those judges who handles my discovery  
23 disputes myself. Part of my process in doing that is as you'll  
24 -- I don't know if it's stated in my policies and procedures,  
25 but I always say at the Rule 16, if you have any discovery

1 disputes, please don't file any motions to compel. Send me a  
2 letter, tell me what the problem is. We'll get on the phone and  
3 we'll work it out.

4           The nature and scope of the discovery disputes in this  
5 case may not lend itself or themselves to such, you know,  
6 comparatively informal resolution. And I didn't know if you had  
7 any thoughts on that yet. But if we're getting stuff that's  
8 really kind of, you know, weighty and meaty and things that now  
9 I've got to think about an order and a written opinion on and all  
10 that stuff, maybe we think about a Special Master at the right  
11 time. Any thoughts on that to this point?

12           MR. NICHOLAS: My only reaction is I don't think we  
13 need -- I would agree with you that it's premature or unnecessary  
14 at the moment. We're working together so far, pretty well. I  
15 also think -- you know, it will be good to turn to you in the  
16 first instance and see how that's going. So I would wait.

17           THE COURT: The first instance doesn't worry me. The  
18 fourth, fifth, sixth, seventh --

19           MR. NICHOLAS: Yeah.

20           THE COURT: -- yeah, that's what starts to bother me.

21           MR. NICHOLAS: Yeah, yeah. Well, maybe we won't have  
22 four, or five, or six, or seven.

23           THE COURT: You get your one free bite.

24           MR. NICHOLAS: One free bite of that, great. So  
25 anyway, I guess I'm just sort of agreeing with what you're

1 saying.

2 THE COURT: Okay.

3 MR. NICHOLAS: You know, seems fine to wait.

4 THE COURT: Mr. Jones, any difference of opinion?

5 MR. JONES: That makes sense to me, Your Honor.

6 THE COURT: Yeah.

7 MR. JONES: It's not something we've discussed and  
8 really haven't had reason to discuss at this point. So maybe  
9 it's a bridge we cross when we get to it.

10 THE COURT: Okay. I have a very fine lawyer in town  
11 who's done a very good job in a class -- in a spew of class  
12 actions with two well-armed, well-populated opponents who  
13 literally cannot agree on anything. And that's worked out fine.  
14 You've already agreed to more before the Rule 16 than they have  
15 in now seven years of litigation. So I guess we're doing better.

16 Okay. Is there anything anyone else would like to say  
17 about the proposed schedule or the timeline for the case? Sir.

18 MR. MAHADY: Good afternoon, Your Honor. Joe Mahady.

19 THE COURT: How are you?

20 MR. MAHADY: ell, thanks. How are you?

21 THE COURT: Good.

22 MR. MAHADY: We do agree with the Government that two  
23 years is necessary for fact discovery. And one point of emphasis  
24 from the Defense. We think it's going to be critically important  
25 early on in the discovery period to identify the alleged

1 violations at issue in this case, which is going to identify the  
2 population that we're going to focus on, but also the customers  
3 that we're going to focus on.

4           Flowing from the identification of the alleged  
5 violations is going to be discovery into the customers, which I  
6 think the Government agrees. And much of that will involve third  
7 parties, possibly the customers themselves, possibly State Boards  
8 of Pharmacy. Based off of our experience, that can take quite an  
9 amount of time. And so for that additional reason and given that  
10 there's going to have to be some sequencing of this, we do think  
11 two years is appropriate and necessary here.

12           THE COURT: Okay. I appreciate that too. And you  
13 raised an issue I was going to talk about as well, which is third  
14 party discovery, and I know you touch on that in your submission.  
15 What I would typically say to the lawyers is if you're going to  
16 subpoena any entities, particularly for records, and you need any  
17 kind of release or authorizations to do so to exchange them.  
18 This wouldn't be that situation. They wouldn't have the releases  
19 or the authorizations.

20           All I would say is, and you have enough time and you'll  
21 sequence it in, you know, the order that's best for everybody, to  
22 the extent -- as soon as you kind of realize who you're going to  
23 need stuff from to get that process started as soon as you can so  
24 that we're not all hung up by summer calcitrant, a third party  
25 recipient who doesn't think that they have to do anything because

1 I have less than direct jurisdiction over them.

2 Now, we can change that, but I don't want us to get  
3 held up. So I would say advance with your third party discovery,  
4 A) on the timeline that's best for you, but b, as soon as you're  
5 able to minimize any third parties holding any of you guys up and  
6 ladies.

7 Okay. You will be prepared to discuss -- your  
8 submission says you'll be prepared to discuss the processes for  
9 settlement. What are those processes?

10 MR. JONES: Your Honor, so --

11 THE COURT: Are they anything other than the line that  
12 follows, which is, you know, where you have to get authority  
13 from?

14 MR. JONES: That's a very significant part of it, yes.  
15 You know, that's meant to preview essentially that coming here  
16 today, you know, unlike, perhaps --

17 THE COURT: I can't believe you're not in agreement.  
18 That's an outrage. It's a waste of my time.

19 MR. JONES: We're always going to have to seek  
20 authority from, you know, the respective decision makers --

21 THE COURT: Your client. Yeah. Yeah.

22 MR. JONES: -- the Department of Justice to be able to  
23 have authority to settle.

24 THE COURT: Well, that I understand. But are you  
25 warning me that that answer could take a long time to come or

1 will there -- if there is an appropriate time, if we get to  
2 crunch time, will there actually be someone on the other end of  
3 the phone, if you need them?

4 MR. JONES: I think if we proceed to a mediation, for  
5 example --

6 THE COURT: Right.

7 MR. JONES: -- we're going to do everything we can to  
8 front load that process so that we walk into there ready. We  
9 know, you know, what our position is --

10 THE COURT: Right.

11 MR. JONES: -- and we're ready to go. And so that --  
12 you know, I don't know much what else to say beyond that.

13 THE COURT: Okay.

14 MR. JONES: That's what we can do. And, you know, I've  
15 been in -- I handle a lot of defensive cases also in this Court  
16 for the Government, and that sometimes we need to call back to  
17 agency counsel to make sure we have the authority we want and  
18 then every now and then we might change our authority in the  
19 course of a settlement conference. This is going to be a more  
20 formalized process than that, I would think.

21 THE COURT: You raised the word mediation, and the  
22 first order of business in my scheduling order is always a  
23 referral to Magistrate Judge Hey for settlement purposes. And  
24 that will be in the order anyway because that then gets this case  
25 on Judge Hey's docket, if he will. But has your experience,

1 individually or collectively, told you that in a case like this,  
2 if you're going to pursue a process, it would likely be with a  
3 private mediator as opposed to the magistrate judge or had you  
4 given any thought to that as well?

5 MR. JONES: Your Honor, that's something that we've  
6 actually been kind of discussing right now.

7 THE COURT: Okay.

8 MR. JONES: You know, since we're in the midst of  
9 figuring out what might be the best forum, you know, the most  
10 productive, efficient forum to conduct future settlement  
11 discussions --

12 THE COURT: Okay.

13 MR. JONES: -- and that's something that's, you know,  
14 actively being discussed.

15 MR. NICHOLAS: We each know where each other lives, and  
16 we each know each other's phone numbers, and we have communicated  
17 very recently on this subject. We're always willing to talk  
18 about, you know, processes for settlement. We did mediate.  
19 There was a mediation a year ago, which was not successful.

20 THE COURT: Okay.

21 MR. NICHOLAS: And so --

22 THE COURT: Does my ruling on the potential scope of  
23 the damages change the dynamic with respect to a mediation issue  
24 at all?

25 MR. NICHOLAS: It's early to answer that question --

1 THE COURT: Okay.

2 MR. NICHOLAS: -- is really my answer.

3 THE COURT: That's fair enough.

4 MR. NICHOLAS: The only thing I want to say is it is  
5 very important, from our point of view, to start the case, to  
6 take discovery, because we've taken none. They've obviously had  
7 the opportunity --

8 THE COURT: Right.

9 MR. NICHOLAS: -- to have a lot of information over 12  
10 years. We need to put it as directly as possible, get going, and  
11 balance the record here.

12 THE COURT: That's fine.

13 MR. NICHOLAS: So that's where we're at.

14 THE COURT: So you attempted to mediate this case, this  
15 dispute, before the complaint was filed?

16 MR. NICHOLAS: Yeah.

17 THE COURT: Did you use a private mediator?

18 MR. NICHOLAS: Yes.

19 THE COURT: Okay. Would that person or persons be  
20 available to you? Do you know, going forward, given his or her  
21 history with the case? And, if so, does it make any sense to  
22 give that person or persons a heads up and get on their schedule  
23 in case -- just in case? Because as you guys know, and as I've  
24 found, when the parties come to me halfway through the case and  
25 say, we've decided to mediate, then it's, oh, well, we can't get

1 -- you know, we can't get on -- the next open date for the  
2 mediator is, you know, August 14th, and so we lose a big chunk of  
3 time. And I was just trying to -- you've probably thought of all  
4 this, but just trying to maybe eliminate that as a chunk of time  
5 we could lose.

6 MR. NICHOLAS: Don't know the answer to the question of  
7 whether it makes sense to ever go back to that mediator or not.  
8 It may not. I think we would want to talk to the Government  
9 about it --

10 THE COURT: Okay.

11 MR. NICHOLAS: -- but understand what you're saying.

12 THE COURT: Okay. Okay. Did you wish to say anything  
13 on that?

14 MR. JONES: Nothing more to add on that, Your Honor.

15 THE COURT: Okay. That's fine. I'm going to respect  
16 and defer to your timeline. We have good lawyers and a lot of  
17 them, and a very thorough discussion of this and some experience  
18 on how these cases can play out involving these types of entities  
19 and Governmental agencies.

20 So it's important to know what you don't know, and what  
21 I don't know is a better alternative to what you've proposed. So  
22 I have no problem with that. And I want to respect the time that  
23 you've put into this. I won't be offended if there's no  
24 dispositive motion, just so you know. Don't worry about that.  
25 No need for phase discovery. I agree. Beyond the proposal to

1 stagger, fact and expert, I agree. That's what I would have  
2 asked you to consider anyway.

3 A protective order is something I will gladly sign for  
4 you. My policies and procedures speak to those as well, as long  
5 as I have the ability to modify it in the interest of justice,  
6 with appropriate notice to the parties. That's all fine. I'll  
7 respect how you can come to agreement on things.

8 I appreciate your negotiations and agreements with  
9 respect to the scope of discovery and depositions. All,  
10 obviously, okay if done by agreement with counsel, and those all  
11 seem very reasonable to me, both paragraph four and footnote one  
12 on page four. Your proposal with respect to ESI. Happy to sign  
13 off on that as well. Third parties we've talked about.

14 What I'll do is -- I do notice that in your proposed  
15 timeline, you do not include a date for dispositive motions,  
16 responses, and all that stuff. I like a schedule without that in  
17 it a lot better. So I'm happy to take the dates that you have  
18 submitted on page 5, and kind of mold them into my standard form  
19 scheduling order. So can I do that as is?

20 And then if there's the threat of a dispositive motion,  
21 you can warn me at the appropriate time and we can rejigger  
22 things as needed. Is that all right?

23 MR. NICHOLAS: That's fine with us.

24 MR. JONES: That makes sense, Your Honor.

25 THE COURT: All right, good. Okay. Is there anything

1 anyone else wanted to say with respect to discovery, or  
2 scheduling, or anything? My policies and procedure str -- I'm  
3 sure you've read them all. Some of them have less relevance to a  
4 case like this than a standard civil dispute. But if you have  
5 any questions on any of that stuff, please call us.

6 The referral to Judge Hey, the discovery dispute issue,  
7 potential for a special master if needed at the right time.  
8 Mediator. I think we've covered the big ones. Mr. Jones.

9 MR. JONES: Your Honor, we submitted --

10 THE COURT: I was going to get to that next.

11 MR. JONES: Okay.

12 THE COURT: Yeah. So I was just wrapping up scheduling  
13 and discovery. Anything else on schedule or discovery? No?  
14 Okay. Mr. Jones, what is this about, the proposed stipulation?  
15 I mean, I know what it's about. I think a better question is, is  
16 this really necessary?

17 MR. JONES: I think so, Your Honor.

18 THE COURT: And the follow-up question to that is, are  
19 you sure this is necessary?

20 MR. JONES: Yes, Your Honor. So the motion -- the  
21 stipulation is for a schedule for a motion to strike certain of  
22 the Defendant's affirmative defenses.

23 THE COURT: So what would -- can you give me an example  
24 or two?

25 MR. JONES: Yes. So it would be principally focused on

1 the equitable defenses stated in Amerisourcebergen and the  
2 Defendant's answer, right. There are very strict limitations on  
3 the ability of a private party to raise equitable defenses to  
4 statutory claims such as what we brought here. So they have  
5 raised defenses for -- I don't have -- well, I've got them in  
6 here somewhere, but there are acquiescence and equitable  
7 estoppel, things of that nature.

8 And our position is those defenses are legally  
9 insufficient as a matter of law. And so we'd like to --

10 THE COURT: Why strike -- I mean, you know, motions to  
11 strike, I get it. But why worry about that, because if you're  
12 right I can take that up at either a motion in limine stage, or a  
13 pretrial conference, or -- do the affirmative defenses affect  
14 discovery at all and the time -- either the scope, content, or  
15 timeline for discovery?

16 MR. JONES: I think so. I think it will help shape the  
17 scope of discovery here. And the reason is, is that --

18 THE COURT: So if I grant your motion to strike, you'll  
19 need far less time on the schedule, right?

20 MR. JONES: No, Your Honor.

21 THE COURT: Well, you can't have them both.

22 MR. JONES: I wouldn't quite make that concession. The  
23 equitable defenses will -- well, they will help shape the course  
24 of discovery. And I think that one of the underlying disputes  
25 that is kind of probably pervade a little bit of the discovery

1 approach in this case is going to be -- the Defendants -- from  
2 our perspective, this case at its core, is about the information  
3 that the Defendants had and what they did with it. And the  
4 Defendants have very much previewed that their defense would  
5 likely be very -- much more focused on what DEA was doing at the  
6 same time. And we think that that set of information is really  
7 fundamentally a side issue, kind of a tertiary issue to the core  
8 dispute in this case, which is --

9 THE COURT: But an issue in their -- but an issues for  
10 the Defense to pursue and, if appropriate, argued to the jury,  
11 right?

12 MR. JONES: I mean, it depends exactly on what  
13 information we're talking about and what evidence, and we'll have  
14 to address that probably on a case by case basis. But for here,  
15 whether it's actually a viable defense or not, or whether it  
16 could be legally, as a matter of law, a viable defense is going  
17 to affect how we assess things when we're responding to discovery  
18 requests about, well, what's proportional to the needs of this  
19 case.

20 And so if we can -- what we would like to do is  
21 establish and have the Court confirm that these are fundamentally  
22 legally insufficient defenses on the basis of the pleadings. And  
23 so we would ask the Court to strike them.

24 THE COURT: So what I'm hearing is that there is a  
25 degree, or a subset, or a portion, or maybe all of the Defense's

1 argument that this wasn't an issue for the DEA. The DEA said it  
2 was okay. The DEA didn't have a problem with it. I understand  
3 your point about how in certain cases, certain defenses aren't  
4 appropriate in actions brought by the Government. I don't know  
5 what those are and to what extent that's true, though I know you  
6 have a basis for telling me that.

7 But why at this stage should I attempt to purport to  
8 limit how the defense is going to argue its case? It doesn't  
9 seem to make any sense for me to do that because I would be  
10 dealing largely with the unknown, as we all would, because you  
11 wouldn't really see yet, because they haven't seen yet why the  
12 DEA did or didn't do what they did or didn't do. Wouldn't that  
13 be a better issue for me to take up -- God strike me for saying  
14 that -- at a summary judgment stage, or a motion in limine stage,  
15 or something like that. Doesn't that make more sense?

16 It's not going to -- I don't hear you saying, you know,  
17 that if the Court rules the way that we believe the Court should  
18 rule on this at this point, then there's going to be this whole  
19 massive category of discovery that I will have ruled is  
20 irrelevant and it will expedite things and reduce the burden to  
21 the Government. I don't hear that. I hear that it could shape  
22 discovery.

23 And the other question I have just, you know, as a  
24 practical matter is, is it really safe for me to try to weigh in  
25 on that now as opposed to just seeing what the issue is at the

1 end of the day and limiting, if appropriate, what the Defense can  
2 argue at trial or what evidence is or is not admissible? That  
3 just seems to be a better way to do it. Is this motion to strike  
4 something that you have done or the Government has done in other  
5 cases like this?

6 MR. JONES: Yes, Your Honor, actually, there was --

7 THE COURT: And have courts taken them up at the motion  
8 to strike stage and stricken affirmative defenses?

9 MR. JONES: Yeah, there was a recent case in  
10 California, the Kaiser case, where the District Court struck  
11 affirmative defenses.

12 THE COURT: He's not asking me to, like, follow what  
13 they do in California; is he?

14 MR. JONES: I'm just doing my best to answer your  
15 question, Your Honor.

16 THE COURT: All right. Okay.

17 MR. JONES: There is certainly precedent for it, is all  
18 I'm trying to say, including very recent precedent on, you know,  
19 fairly analogous patterns here.

20 And so, yeah, I think it would add clarity for the  
21 parties as we go about discovery. I mean, if the Court, you  
22 know, were to defer ruling or decline ruling or just, I guess,  
23 deny it out of hand, the issue would certainly recur and very  
24 likely in the course of discovery disputes.

25 THE COURT: It sounds very much like it's a legitimate

1 issue for the Government to pursue and, you know, it's a  
2 legitimate issue for the Defense to tackle and to explain to me  
3 why, no, this really is relevant. I mean, this is what our  
4 defense is going to be, et cetera, et cetera let me hear the  
5 Defense's perspective on that.

6 MS. BOHNET: Thank you, Your Honor. We agree that it's  
7 not necessary at this point.

8 THE COURT: Is that because that's just what I said, or  
9 did you really believe you?

10 MS. BOHNET: You said it so nicely. No. Your Honor,  
11 it's a fairly demanding standard for a motion to strike and --

12 THE COURT: I think the language typically is  
13 disfavored.

14 MS. BOHNET: Yes, they are highly disfavored.

15 THE COURT: Highly disfavored.

16 MS. BOHNET: Part of the analysis is whether the  
17 Defense could basically never succeed. And the other part of the  
18 analysis is the prejudice to the moving party. As Your Honor  
19 highlighted, a lot of the discovery that we're interested in  
20 hearing about what DEA knew and what DEA did and what DEA was  
21 telling our client and others in the industry. That's relevant  
22 to our affirmative defenses, and it's also relevant to just our  
23 regular defenses, the negligence inquiry, the reasonableness  
24 aspect of that. It's going to all be the same discovery.

25 So we don't really think there's going to be this whole

1 other universe of discovery that would only be relevant to an  
2 affirmative defense. If when push comes to shove, you know,  
3 we're asking for something that the Government feels is only  
4 relevant to an affirmative defense that they don't think is  
5 appropriate, perhaps it would be better to deal with it then.  
6 But for now, we think that there's no prejudice here and that the  
7 discovery is all going to be taken anyway.

8 THE COURT: I appreciate that. Sir, anything to  
9 respond to?

10 MR. JONES: Your Honor, I mean, I think fundamentally,  
11 it's the same position I articulated a moment ago. I think that  
12 the parties would benefit from clarity as we proceed through  
13 discovery on these issues. The rule, you know, of course,  
14 provides for the striking of legally insufficient defenses, and  
15 that's what these are. These defenses are really not available  
16 in this context where Congress has specified for statutory  
17 penalties.

18 THE COURT: Well, what kind of defense would you --  
19 give me the best example you could of a defense that Amerisource  
20 has raised that you think would be legally, across the board,  
21 unavailable to them as they defend their case to the jury.

22 MR. JONES: Sure. So one of Amerisource's defenses is  
23 waiver, and that's based on the idea that the DEA waived the  
24 United States' ability to obtain penalties by continuing to renew  
25 the DEA registrations. All right. So this is a topic actually

1 even already addressed, to some extent, by the Court in the  
2 motion to dismiss ruling that conflicts with the text of the  
3 Controlled Substances Act. DEA agents are just not authorized to  
4 make that kind of waiver and --

5 THE COURT: Would it be limited to waiver, though?  
6 Wouldn't the Defendant's argument also be, in part, in addition  
7 to maybe a legal issue of waiver but more a credibility attack at  
8 trial where it's, how were we to know that what we were doing was  
9 wrong when the experts to whom we were submitting this weren't  
10 telling us we were doing anything wrong? That's not waiver per  
11 se, is it? That more goes to their state of mind or their  
12 culpability, doesn't it?

13 MR. JONES: Yes, I think as you're articulating it, it  
14 would be offered for --

15 THE COURT: And how would I be able to draw that line,  
16 at this stage, as to what I'm precluding them from arguing and  
17 why?

18 MR. JONES: You would not be precluding any evidence, I  
19 don't think by making this ruling at this time, necessarily. I  
20 mean, that would be --

21 THE COURT: In interpret your whole reason for me to do  
22 that is, of course I would, because I would be, in essence,  
23 ruling out their ability to obtain discovery on it and,  
24 therefore, their ability to present any evidence of it. So I  
25 would be limiting the evidence, right.

1           MR. JONES: Well, I think what would be happening is  
2 that the Court would be setting up kind of the guidelines for  
3 discovery. And, you know, when we're considering proportionality  
4 in the course of discovery, of course, fundamental to that is,  
5 well, what are the claims and what are the defenses? And if one  
6 of these defenses is off the table, that gets thrown into the  
7 mix, right.

8           THE COURT: Well, let's say one of the defenses, or  
9 more correctly, a portion of one of the defenses is off the  
10 table. Let's say you're correct. I don't know if you are, but  
11 let's say you're correct and say, well, they can't argue waiver,  
12 but there's got to be something about that conduct that's  
13 relevant to another defense they might have.

14           How do I draw that line now, particularly when I don't  
15 really see what the evidence is going to be? I mean, I've seen  
16 them characterize it in their motion, of course, but what that  
17 evidence is going to be, what that document is going to look  
18 like, what that person at the DEA might say, and how they attempt  
19 and what their argument is for why it's relevant to the defense  
20 of their case? I won't know that at the time I purport to rule  
21 on your motion.

22           MR. JONES: And we wouldn't be asking the Court to make  
23 any particular ruling on a particular document or what have you,  
24 and, in fact, if there is --

25           THE COURT: But you're asking me to make a ruling on

1 categories of stuff that particular documents would fall within,  
2 and I wouldn't know what the particular documents are.

3 MR. JONES: We would be asking you to make a ruling  
4 about --

5 THE COURT: You're getting a sense I'm not real big on  
6 this idea?

7 MR. JONES: I am, and, you know, perhaps I should just  
8 sit down and take my lumps, and that's fine. I've been there  
9 before.

10 THE COURT: We all have.

11 MR. JONES: Yeah. So --

12 THE COURT: Trust me. And I didn't give up taking  
13 lumps once I put this on.

14 MR. JONES: Very well. I'll just, I guess, finish by  
15 saying we're not purporting to preclude the Defendants from  
16 arguing, in the course of discovery, on a motion to compel or  
17 what have you, that some document that they want might be  
18 relevant to, you know, a negligence based defense or something  
19 like that. We're just asking at the outset; it makes sense to  
20 sort of set the guidelines for what the claims and defenses are  
21 in the case. Thank you.

22 MS. BOHNET: Your Honor, I'll be brief, since I'm  
23 hoping you're on our side here, but it feels to us that the  
24 Government is trying to limit discovery. I'm not sure what  
25 clarity would be provided other than trying to limit discovery.

1 It sounds like a bit of a burden shift where instead of being  
2 entitled to go seek the discovery we think is necessary, we're  
3 going to have to file a motion with Your Honor to be allowed to  
4 do so.

5 THE COURT: Or if you seek discovery, the objection and  
6 refusal to turn it over would be to cite my ruling saying, I've  
7 limited this.

8 MS. BOHNET: Yes.

9 THE COURT: And then you'd have to come to me and say,  
10 well, this doesn't really fall within what you ordered, and  
11 here's why.

12 MS. BOHNET: Exactly. Exactly.

13 MS. BOHNET: The Government has been investigating the  
14 company for many, many years now. We think we're entitled to  
15 equally broad discovery. We think that these issues are going to  
16 be very relevant to many aspects of the case, and we just don't  
17 see a need to deal with this now.

18 THE COURT: Yeah, I agree with the Defense. I do. You  
19 know, Mr. Jones, I can't tell you, you can't file a motion, but  
20 I'm not going to sign off on a stipulation for something that I  
21 don't think I should be taking up at this point. If the  
22 Government wishes to file a motion, it can file it. There's a  
23 lot I can, you know, do with it. Obviously, I'd look at it. I  
24 could deny it without prejudice, which would be the most likely  
25 route I would take, unless it's something that's just so clear

1 that I would be really comfortable in a case like this having an  
2 appellate court saying, yeah, he knew enough about what he was  
3 ruling on at the time, and he made the correct ruling and, you  
4 know, he drew the lines where they should have been drawn. And  
5 that's -- and I don't feel comfortable yet. Maybe your motion  
6 would clarify all that for me. I'm sure you would make a good  
7 argument, but I'm not going to sign the stipulation and proposed  
8 order.

9 I would hope that I could take these issues more as  
10 they come, based on what, you know, we see. And while you did  
11 suggest that the motion could provide clarity, or my ruling on it  
12 could provide clarity, I'm still not hearing how, look, this  
13 issue is clear cut enough and broad enough that we could limit  
14 the case to a much more efficient schedule and reduce the burden  
15 on the parties for something that's not going to be an issue at  
16 trial anyway.

17 But that's not the argument I hear the Government  
18 making. It's more you would like to know kind of what the rules  
19 are and where the lines are drawn before we go in, and I just  
20 don't think I'm ready to do that yet. But, you know, as the case  
21 proceeds, if the battle lines harden on something there that's  
22 more concrete, you know, obviously, I or the special master will  
23 be happy to take that up. I just don't think it's the right time  
24 for it.

25 But again, you know, you can -- I can't tell my

1 Government that they can't file a motion.

2 MR. JONES: Understood, Your Honor.

3 THE COURT: All right. Anything else?

4 MR. NICHOLAS: No, Your Honor.

5 MR. JONES: No, Your Honor.

6 THE COURT: All right. What we'll do, as I mentioned,  
7 is we'll take your proposed timeline, we'll blend it into my  
8 proposed order. Another variation on my proposed order would be  
9 typically what I would do -- let's see here. There are no dates  
10 in your proposed timeline on the schedule. There are in the  
11 papers for a trial date.

12 In my scheduling order, in a typical case, I would have  
13 the pretrial and trial dates in the order, and I would tell the  
14 lawyers that I strongly believe that the trial date is the best  
15 way to get a case resolved and it's not going to move, absent  
16 some extraordinary happenings. This is a case that's harder to  
17 make that threat. Threat is a terrible word. Statement.

18 The last line on the schedule is the expert discovery  
19 cut off, okay. While we have a mention of a prospective trial  
20 date for the reasons I alluded to earlier, I wouldn't be quick to  
21 schedule a trial for that time frame. But does everyone think  
22 it's best that we end the schedule for now at the expert  
23 discovery cut off and that the next line on the scheduling order  
24 could be a scheduling conference, if necessary, to determine  
25 remaining dates? One might be for summary judgment. Maybe at

1 that point someone would think they have a viable summary  
2 judgment motion. That's where we could then take up the  
3 scheduling of briefing and argument on that.

4 It doesn't seem to make sense for me to try,  
5 particularly when we don't know if there's going to be a  
6 dispositive motion for me to put in Daubert motions in limine,  
7 final pretrial conference, and trial. Is everyone okay with the  
8 schedule ending with the proposed expert discovery cutoff?

9 MR. NICHOLAS: I think that makes the most sense.

10 THE COURT: Okay. Mr. Jones?

11 MR. JONES: Agreed, Your Honor.

12 THE COURT: Okay. Okay. That's what we'll do. So  
13 we'll take what you've given me, we'll put it into our format.  
14 If you need us at any time, let us know. Is there anything else  
15 anybody wanted to take up today?

16 MR. JONES: No, Your Honor.

17 THE COURT: No?

18 MR. NICHOLAS: No, Your Honor.

19 THE COURT: All right. Great. Listen, thanks again  
20 for all your hard work and for working so well together to this  
21 point. I hope it continues. And it's obviously a very  
22 interesting case for us and also a case that presents us with an  
23 unfortunately relatively rare circumstance of having excellent  
24 counsel on both sides of the V. So thank you for that. And if  
25 you need anything else or have any questions, follow up with

1 chambers. And if you need to get on the line on anything, you  
2 know, let us know. We'll take care of that. Okay. All right.  
3 Great stuff. Thanks, everybody. We'll turn this around for you  
4 as quickly as we can.

5 MR. JONES: Thank you, Your Honor.

6 MR. NICHOLAS: Thank you, Your Honor.

7 MS. BOHNET: Thank you, Your Honor.


8 THE COURT: You're very welcome. Thank you.

9 (Proceedings concluded at 1:44 p.m.)  
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CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: February 27, 2024

  
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Jessica B. Cahill, CER/CET-708